No. 261.

Reply Brief of Wilson & Bennett for P. C.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Oct. 18, 1897.

ALBERT F. HOLDEN, Plaintiff in Error,

vs.

HARVY HARDY, Sheriff of Salt Lake County, Utah.

No. 261.

BRIEF IN REPLY TO BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Counsel for defendant in error in the above-entitled case, in their brief in support of the constitutionality of the statute of Utah involved herein, have in some instances evidently misapprehended, and therefore misstated, our positions and contentions with regard to several of the questions discussed by us in the brief in behalf of the plaintiff in error; and therefore, in order that no confusion or mistake may result from these inaccuracies in the brief of counsel for the defendant in error, we deem it due to the court, as well as to ourselves, that we should here call attention to such of these erroneous statements as we think it important to notice. This we will do as concisely and briefly as possible.

I.

On page 6 of the said brief of counsel for defendant in error it is said:

"By this language" (referring to the proposition stated at the head of page 6 of the brief for plaintiff in error) "we understand counsel to adopt the rule which is sustained by many decisions, viz., that if it is in exercise of the police power—if it can reasonably be construed as a provision for the health, safety, or general welfare—it will not be held invalid because of a conflict with the Constitution."

This statement of our position is inaccurate. It seems to us that upon a most casual reading of our discussion of this matter on pages 6 to 21 of our brief, our meaning will be found to be perfectly plain. Our proposition is that the Constitution of the United States is the supreme law of the land, and paramount to any enactment of a State legislature, whether adopted as a health measure or not, which is in conflict with any of its provisions.

To this proposition we cited in our brief several authorities. On page 8 we quote the language of Justice Field in the *Slaughter House Cases* (16 Wall., 87), where he says:

"Under the pretense of prescribing a police regulation, the State can not be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgement."

We also quoted the following language from the opinion of the court in the case *in re Jacobs* (98 N. Y., 107):

"But the power" (the police power), "however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law * * * and, so far as it imposes restraints, the police power must be exercised in subordination thereto."

Many authorities might have been added to these, but we did not consider it necessary to encumber our brief with a further citation upon a point so fundamental and well settled. From the opinion of Chief Justice Marshall in the case of *M'Culloch* v. *Maryland* (4 Wheat., 405, 406), down to the case of *Counselman* v. *Hitchcock* (142 U. S., 457), we have found no dissent from this proposition in the opinions of this court. We will, therefore, add to this citation but one quotation, from the opinion of Justice Harlan in the case of *Mugler* v. *Kansas* (123 U. S., 623–661), in which this principle is so unequivocally stated that counsel for the defendant in error can not well have any further doubt in regard to our position in this matter. It is as follows:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation can not rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *the courts must obey the Constitution rather than the law-making department of the Government*, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To

what purpose,' it was said in *Marbury* v. *Madison* (1 Cranch, 137–176), are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the person on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, under a solemn duty—to look at the *substance* of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. *If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety* has no real or substantial relation to those subjects, *or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.*"

II.

Counsel for defendant in error, on page 7 of their said brief, also say that said statute is not claimed to have the effect of impairing the obligation of pre-existing contracts. This statement of counsel for defendant in error is also erroneous, the holding of the court below that said law did not impair the obligation of such contracts being the basis of the third assignment of error set forth on the 4th page of our brief.

While it may be admitted that in the present case it does not affirmatively appear from the Record that the contract of employment, which was the basis of the

proceeding herein, was in existence at the time of the passage of said act, and was to have continued thereafter for any length of time, still we insist that, even if said act did not impair the obligation of the contract in question in the present case, it is, nevertheless, manifest that it did and does now impair the obligation of all contracts, such as the one involved herein (not only of the plaintiff in error, but of all the other mine owners in the State), that actually existed before and at the time of the passage of said act and which were to continue in force thereafter; and we submit that said statute should, therefore, be declared unconstitutional and void.

We do not consider it necessary to elaborate upon so plain a proposition as that comprehended by said assignment of error, to wit: that a statute which makes illegal an employment under a contract which was perfectly legal and proper at the time it was made, and which thus destroys the equitable and legal rights of the parties thereto, either to compel its performance or to obtain redress for a breach thereof, is unconstitutional as impairing the obligation of such contract.

This principle is fully stated and many authorities in support thereof cited in Cooley's Constitutional Limitations (6th edition, p. 344) as follows:

"The obligation of a contract, it is said, consists in its binding force on the party who makes it. This depends on the laws in existence when it was made; these are necessarily referred to in all contracts and form a part of them as the measure of the obligation to perform them by the one party and the right acquired by the other. There can be no other standard by which to ascertain

the extent of either than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other the right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence, any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

(Citing *McCracken* v. *Hayward*, 2 How., 608–612; *Ogden* v. *Saunders*, 12 Wheat., 213, 257, 259, 302, and many other cases to the same effect.)

"It is the civil obligation of contracts which the Constitution is designed to reach; that is, the obligation which is recognized by, and results from, the law of the State in which it was made. If, therefore, a contract when made is by the law of the place declared to be illegal, or deemed to be a nullity, or a *nude pact*, it has no civil obligation, because the law in such cases forbids its having any binding efficacy or force. It confers no legal right on the one party and no corresponding legal duty on the other. There is no means allowed or recognized to enforce it, for the maxim is *ex nudo pacto non oritur actio. But when it does not fall within the predicament of being either illegal or void, its obligatory force is coextensive with its stipulations.*"

(Citing many cases in Note 2.)

From what has been already said in our former brief concerning this whole subject, and especially concerning the actual operation of this statute with reference to the

subjects to which it relates and the contracts affected thereby, it seems to us to be clear that the principle stated in the above quotation from Cooley is fully applicable to the statute here in controversy, and we will not, therefore, encumber this brief with any further citation of authorities or argument with respect to the matter.

JEREMIAH M. WILSON,
For Plaintiff in Error.

C. W. BENNETT,
R. HARKNESS,
A. HOWAT,
W. M. BRADLEY,
Of Counsel.